Supreme Court, U.S.
FILED
MAY 12 2009
OFFICE OF THE CLERK

Nos. 08-803 & 08-826

IN THE
# Supreme Court of the United States

MATTHEW D. ALFIERI, ET AL.,
*Petitioners,*

AND

KENNETH PIETROWSKI, ET AL.,
*Petitioners,*

v.

SALLY CONKRIGHT, ET AL.,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## SUPPLEMENTAL BRIEF FOR PETITIONERS

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May 12, 2009

## AMENDED LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petition for a writ of certiorari in No. 08-803 correctly identified all the parties that participated in the proceedings below but did not separately set forth those specific individuals who are petitioners here and who are seeking relief from the Second Circuit's decision below. Those 14 individuals are:

Matthew D. Alfieri
Lynn Barnsdale
Bruce D. Craig
Richard C. Crater
John L. Crisafulli
Charles R. Drannbauer
James D. Gagnier
Carol E. Gannon
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Gerald A. Leonardo, Jr.
Andrew C. Matteliano
Walter J. Petroff
Irshad Quershi
Joseph E. Wright

In all other respects, the list of parties in the certiorari petition is correct.

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Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*:

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Petitioners in *Alfieri v. Conkright*, No. 08-803, and *Pietrowski v. Conkright*, No. 08-826 (collectively, "the Participants"), a group of current and former employees in the Xerox Corporation Retirement Income Guarantee Plan ("the Plan," a respondent), submit this supplemental brief[1] to present arguments based on this Court's recent decision in *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 129 S. Ct. 865 (2009). In light of *Kennedy*, it is now clear that the court of appeals labored under a basic misunderstanding of the appropriate relationship between the terms of an ERISA plan and an agreement that purports to waive rights to receive benefits under the terms of the plan. In *Kennedy*, this Court held that such a waiver cannot be given effect when doing so would contravene ERISA's several textual directives that benefits be paid according to the documents that comprise the plan. The Court's reasoning further relied on the policy concern those directives embody: a strong federal interest in uniform and efficient plan interpretation without reference to extraneous documentation that must be evaluated under contestable standards.

ERISA's text is equally controlling in this case. As challenged here, the judgment of the court of appeals rests on its conclusion (contrary to that of the district court) that certain reduction-in-force agreements signed by the Participants waived all claims that they held against the Plan and its administrators ("the Plan Administrators," respondents). Because of those waivers, the court of appeals held that,

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[1] Supplemental briefing is appropriate under this Court's Rule 15.8 because *Kennedy* was handed down on January 26, 2009, and therefore was not available at the time of the Participants' last filing in this docket on December 23, 2008.

even though the Plan Administrators had previously violated ERISA by paying lower benefits than the controlling plan documents require (a violation that respondents do not now dispute), the Participants now have no remedy for that violation, and the Plan and its Administrators may continue to pay the Participants lower benefits than the applicable documents specify. That is just the opposite of what ERISA, as interpreted in *Kennedy*, requires.

The rule adopted by the court of appeals also runs contrary to ERISA's policies as explained in *Kennedy*. That rule contemplates that, before determining what benefits to pay a plan participant or beneficiary, plan administrators will not only seek out and construe termination agreements between participants and their employers for waivers of ERISA rights, but also determine whether those waivers were knowing and voluntary. Such a lengthy and uncertain process will impede the timely collection of benefits — or, alternately, will result in arbitrary enforcement of waivers in a limited set of cases against only some participants and beneficiaries.

This Court should grant the petitions for a writ of certiorari, vacate the decision below insofar as the court of appeals held that the Participants had waived their claims, and remand that aspect of the case for reconsideration in light of *Kennedy*. In the alternative, *Kennedy* provides an additional reason for plenary review of the decision below, as the decision of the court of appeals now conflicts with a recent decision of this Court on a question of nationwide importance.

## I. *KENNEDY* UNDERMINES THE DECISION OF THE COURT OF APPEALS

In *Kennedy*, this Court confronted the question whether a plan administrator should give effect to a waiver of rights to receive pension benefits under an ERISA plan as a beneficiary when that waiver is not a qualified domestic relations order of the kind described in 29 U.S.C. § 1056(d)(3). Before the Court granted review on that question, the majority view among the circuits had been that such waivers should be given effect if the waiver had been voluntary as evaluated under federal common law. *See, e.g., Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1326-27 (5th Cir. 1994), *cited in Kennedy*, 129 S. Ct. at 870 n.5. In *Kennedy*, however, the Court rejected that view and held that a plan administrator must instead pay benefits according to the terms of the plan itself, regardless of whether the person seeking payment has previously signed a waiver that purports to waive the right to receive those benefits. *See* 129 S. Ct. at 874-78.

In reaching that conclusion, the Court relied primarily on the text and structure of ERISA. It found controlling the statute's instructions that a plan must be "established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), which must "specify the basis on which payments are made . . . from the plan," *id.* § 1102(b)(4), and that the plan administrator must act "in accordance with the documents and instruments governing the plan," *id.* § 1104(a)(1)(D), save where those documents conflict with ERISA itself. *Kennedy*, 129 S. Ct. at 875. The Court also relied upon ERISA's policy of creating "a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims

and disbursement of benefits." *Id.* (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001)) (internal quotation marks omitted, alteration in original). That policy disfavors "enquiries into nice expressions of intent" and protects the processing of claims from invasion by "a multitude of external documents" or litigation "over the meaning and enforceability of purported waivers." *Id.* at 875, 876 (internal quotation marks omitted).

The court of appeals decided this case without the benefit of *Kennedy*'s exposition of the controlling principles. Had it given those principles proper weight, it would not have reached the same result. Here, just as in *Kennedy*, a purported waiver unmoored in the statute or the plan itself has been interposed as a barrier to the payment of benefits that would otherwise be required under the terms of the plan (and that other plan participants will receive). The court of appeals held that the waiver was enforceable because it was knowing and voluntary — in that court's view, the waiver was clear on its face, the plaintiffs who signed had had time to consider their decision and the opportunity to consult with an attorney, and they received consideration for the waiver. *See* Pet. App. 19a-20a.[2] The court reached that conclusion despite its prior holding (unchallenged in this Court) that the Plan Administrators had badly misread the terms of the pre-1998 plan and had failed to pay the Participants the benefits to which, under the Plan documents, they were entitled. *See id.* at 6a.

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[2] Citations to "Pet. App." refer to the appendix to the petition in No. 08-803.

The decision below thus recognizes the purported waivers signed by the Participants as a "basis on which payments [may be] made . . . from" — or not made from, which amounts to the same thing — "the plan," 29 U.S.C. § 1102(b)(4), and as an unwritten exception to the respondent Administrators' obligation to act "in accordance with the documents and instruments governing the plan," *id.* § 1104(a)(1)(D). It therefore cannot be reconciled with a "straightforward rule of hewing to the directives of the plan documents," *Kennedy*, 129 S. Ct. at 875, to determine what benefits to pay to whom. Further, this case, like the one in *Kennedy*, is an "action . . . to recover benefits due . . . under the terms of [the] plan," 29 U.S.C. § 1132(a)(1)(B), a cause of action that "reinforces the directive" that a plan administrator must determine the benefits that are due by reference to the plan itself, *Kennedy*, 129 S. Ct. at 875. The court of appeals has held, and the Plan Administrators do not now dispute, that they have failed to pay benefits due under the Plan. *See* Pet. App. 6a.

Moreover, the rule applied by the court of appeals creates just the same impediments to smooth and efficient plan administration that this Court found unacceptable in *Kennedy*. Consider the case of a former Xerox employee who was *not* a plaintiff in this case, but to whom the Plan Administrators have applied their phantom-account offset. The district court expressed the belief that the offset could not lawfully be applied to such an individual, calling it "beyond dispute . . . that use of a 'phantom account' in the manner found unlawful by the Second Circuit decision violates ERISA and cannot be used by *any* plan," and observing that "[i]t is presumed that no plan administrator would knowingly violate ERISA."

*Id.* at 47a n.9. Yet, under the rule applied by the Second Circuit, the Plan Administrators could still apply their unlawful offset if (but only if) the employee had knowingly and voluntarily waived his or her rights in the interim. To make that determination, the Plan Administrators would need to determine that the waiver had been made in the first place; determine whether by its terms it encompassed the claim that they had violated ERISA by applying the phantom-account offset contrary to the plan documents; and apply a nonexhaustive multifactor test to determine whether the waiver had been knowing and voluntary. *See id.* at 15a-16a (the court of appeals, citing *Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992), which applied six factors); *id.* at 35a-36a (the district court, citing *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399, 402-03 (2d Cir. 1989), which applied eight factors).[3]

Doing these things is not straightforward, as the history of this case demonstrates. The language of the waivers provided that the "consideration set forth in this Release [was] in addition to anything of value to which [a Participant is] entitled by law or Xerox policy." *Id.* at 80a (internal quotation marks omitted). The district court and the court of appeals disagreed about whether this language made the waivers ambiguous. The district court correctly observed

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[3] As set forth in the petitions (No. 08-803, at 8-11; No. 08-826, at 18), the court of appeals departed from governing principles of federal common law in its application of the factors set forth in *Finz*, in *Laniok v. Advisory Committee of Brainerd Manufacturing Co. Pension Plan*, 935 F.2d 1360 (2d Cir. 1991), and in other cases. Clarification of these principles remains of sufficient national importance to warrant plenary review. *Kennedy*, however, calls sharply into question whether those principles were even properly invoked in this case.

that this language "suggests that [the Participants] did *not* waive any then-pending claims alleging an entitlement to some particular benefits," *id.* at 40a, and that, in light of the court of appeals' earlier holding, the Participants "were 'entitled by law' not simply to receive *some* pension benefits, but to have their benefits calculated without any reduction attributable to a 'phantom' account," *id.* at 38a. The court then applied the established rule that "any ambiguity [in the waivers] should be resolved against Xerox, which drafted" them, *id.* at 39a, and held that they did not bar the Participants' claims.

The court of appeals, however, disagreed, reasoning that the language on which the district court relied dealt only with "the existence of consideration adequate to render a release enforceable," and not to "the scope of claims thereby released." *Id.* at 17a-18a. It apparently believed that, so long as the Plan Administrators had not "den[ied] [the Participants] any and all pension benefits," *id.* at 18a, they had given the Participants what they were entitled by law to receive under the terms of the waiver. This Court need not address the merits of that implausible conclusion in order to observe that federal judges disagree over the proper reading of the waivers' terms. That disagreement is potent evidence that the court of appeals' rule, like the one rejected in *Kennedy*, would "destroy a plan administrator's ability to look at the plan documents and records conforming to them to get clear distribution instructions, without going into court." 129 S. Ct. at 876.

In sum, the rule applied by the Second Circuit is incompatible with this Court's intervening decision

in *Kennedy*.[4] That decision is therefore an "intervening development[] . . . [that] reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration"; further, "such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). Indeed, the stark contrast between *Kennedy*'s model of ERISA litigation and the proceedings in this case demonstrates that there is more than a "reasonable" probability of a different result after remand. The conditions under which this Court will vacate a decision and remand for further consideration are thus fully met.[5]

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[4] The Participants' argument based on *Kennedy* is properly before this Court. The court of appeals held that the Participants' purported waiver of their claims was knowing and voluntary and therefore that "the releases signed by [the Participants] are enforceable." Pet. App. 20a. This reasoning endorsed the proposition that the knowing-and-voluntary standard properly applies to this case under federal common law. "[R]eview of an issue not pressed" below is consistent with this Court's practice "so long as [that issue] has been passed upon." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotation marks omitted, third alteration in original). Similarly, the petitions for certiorari (filed before *Kennedy* was decided) raise the question of the appropriate federal common law principles that apply here. Whether any such principles properly apply is a "predicate to an intelligent resolution" of that question. *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980) (internal quotation marks omitted).

[5] Vacatur and remand are appropriate only in Nos. 08-803 and 08-826, and the Participants urging vacatur include only those individuals whom the court of appeals held had waived their claims and who are petitioners under those two docket numbers. *Kennedy* has no relevance to the questions presented in No. 08-810. The former and current employees who are respondents there and whose claims have *not* been held waived

## II. *KENNEDY* PROVIDES AN ADDITIONAL REASON FOR PLENARY REVIEW

In the alternative, this case is an excellent vehicle for this Court to clarify immediately that its holding in *Kennedy* prohibits the federal courts from giving effect to putative federal common law waivers not merely in the specific context of domestic relations, but whenever such a waiver is interposed as a barrier to the payment of benefits according to the terms of ERISA plan documents. The principles set forth in *Kennedy* apply to both contexts, but it would blink reality to suggest that employers and plans around the country will accept *Kennedy* in cases unrelated to domestic relations without further litigation.

This case presents that broadly significant question in a particularly important fact pattern. Layoffs of the kind that occurred here are regrettably common in today's economic environment, as are termination agreements that purport to waive all claims an employee may have against a former employer in exchange for a severance package, salary continuance, or other financial relief to soften the blow of the layoff. The question whether workers who are laid off and who sign (as practically all do) a standard-form release should obtain the benefit of a judicial determination of the meaning of their pension plan — or, instead, be bound by common law waiver to a plan administrator's erroneous and unlawful construction — is therefore of importance beyond the facts of this case. *See* Pet. 9-11.

For the reasons set forth above, the decision of the court of appeals conflicts with *Kennedy*, a recent

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certainly do not seek vacatur but rather have explained in detail why the petition in No. 08-810 should be denied.

decision of this Court. Further, the appropriate application of *Kennedy* to these facts is an important question of federal law that has not been, but should be, decided by this Court. That is particularly so because of the strong federal interest in the "nationally uniform . . . administration" of ERISA plans, *Egelhoff*, 532 U.S. at 148. Accordingly, if this Court chooses not to vacate and remand for further consideration in light of *Kennedy*, plenary review is appropriate.

## CONCLUSION

This Court should grant the petitions for a writ of certiorari in Nos. 08-803 and 08-826, vacate the decision below insofar as the court of appeals held that the Participants had waived their claims, and remand that aspect of the case for further consideration in light of *Kennedy*. In the alternative, those two petitions for a writ of certiorari should be granted and the case should be set for argument on the merits.

Respectfully submitted,

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